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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appeal No. 2019-000574

Elizabeth Lofton,.....Appellant,

v.

Berkeley Electric Cooperative, Inc. and
John Lucas Tree Expert, Co.,.....Respondents.

RESPONDENT BERKELEY ELECTRIC COOPERATIVE, INC.'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Respondent Berkeley Electric Cooperative, Inc. (hereinafter, BEC), hereby moves this Court for a rehearing regarding its decision reversing and remanding the Circuit Court's grant of summary judgment as set forth in the Court of Appeal's Unpublished Opinion, No. 2022-UP-089, filed on March 2, 2022. In ruling that the Circuit Court abused its discretion in failing to rule on Appellant Elizabeth Lofton's Motion to Amend her Complaint—filed an hour before the hearing on Respondents' motions for summary judgment—the Court has overlooked and/or misapprehended key facts, the South Carolina Rules of Civil Procedure, and applicable case law.

As summarized by the Court in its unpublished opinion:

> In October 2016, Respondents filed motions for summary judgment, arguing Lofton lacked standing in her personal capacity because the Trust

> owned the Property. These summary judgment motions were not heard because Lofton's action was stricken from the docket pursuant to Rule 40(j), SCRCP. The action was restored to the docket in January 2018. In August and September of 2018, John Lucas and Berkeley Electric, respectively, filed motions for summary judgment, reiterating Lofton lacked standing to bring the action in her personal capacity.
>
> Lofton filed a motion to amend in response to Respondents' motions for summary judgment on the day of the summary judgment hearing. Her motion to amend sought leave to change the named plaintiff to herself as trustee of the Trust pursuant to Rule 15, SCRCP. In her response to Respondents' summary judgment motions, Lofton conceded that, as named, she lacked standing to bring her claims in her personal capacity. Lofton intended to show that amending the pleadings to reflect Lofton as the named trustee would remedy the standing defect and would not prejudice Respondents.

Unpublished Opinion No. 222-UP-098, pp. 2-3.

As set forth in Rule 56(b), SCRCP:

> A party against whom a claim, counterclaim, or cross-claim is asserted or declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

Rule 56(c), further provides:

> … The adverse party may serve opposing affidavits not later than two days before the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

And, according to Rule 56(e):

> … When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in his pleading, but his response, by affidavit or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(c)-(e), SCRCP.

Lofton failed to submit anything in response to Respondents' motion for summary judgment which the Circuit Court could properly consider under Rule 56, SCRCP. Instead, Lofton sought to misdirect the Circuit Court from her legally insufficient opposition with a last-minute motion to amend:

> MR. WHITSITT: I have as of this day filed a motion to amend only to change the plaintiff's name -- or the named plaintiff to be the trust. In terms of authority that my client has to bring the lawsuit, she is indeed the trustee of the trust. She's also the executor of her mother's estate, which is where the trust comes from. So, there has been some issues with my client's health. She's been near death a couple of times now. So, that's why we haven't been able – I haven't been able to meaningfully consult with her regarding what she wanted to do about the trust. I think they thought when they originally filed this case that the trust would be wrapped up before this case went anywhere, but that is not what happened. And so, it is true, the trust is indeed – or the property is indeed owned by the trust but my client does have the right to bring that lawsuit on behalf of the trust as trustee. And so I simply ask the Court to allow her leave to amend to that effect.…

R. pp. 157:9-158:1.

> MR. POPE: Your Honor, there is no affidavit before you that the plaintiff has been [in] ill health that has somehow affected her ability to proceed in this matter. There is no affidavit that attaches the trust that shows she has the authority to bring lawsuits, nothing, nada. …

R. pp. 162:23-163:2.

MR. POPE: He's brought you not the first affidavit to support his position. He's known about their motion for -- since it was filed. Mine was filed in September. The timing in this case is now. There are no genuine issues of material fact. We ask that you grant the motion.

THE COURT: Mr. Whitsitt, he brings up a good point.

MR. WHITSITT: Yes, Your Honor.

THE COURT: About the affidavit, why hasn't that been filed?

MR. WHITSITT: Well, firstly, my client has just gotten out of the hospital yesterday, is my understanding. I am happy to supplement the Court with my affidavits immediately showing that she has the authority as the trustee. …

R. pp. 163:15-164:3.

MR. WHITSITT: At a certain point, the only real issue before my client in this Court that would actually prevent her legally from bringing this case is her standing issue. And really all we can do, Your Honor, is ask that it's in your sound discretion that she be allowed to amend it.

THE COURT: Well, I really don't think that a motion to amend is properly before this Court at this time. Certainly -- ---

MR. WHITSITT: It's not at this time, no.

THE COURT: Certainly the other parties would need to receive notice and an opportunity to prepare for such a hearing.

MR. WHITSITT: Absolutely, and I will ---

THE COURT: So, I'm not prepared today to really move forward and make any kind of a ruling on that. …

R. p. 165:3-17.

> THE COURT: When did you take this case over?
>
> MR. WHITSITT: I would say probably at the beginning of the summer, but I'm not sure.[1]
>
> THE COURT: Okay. Yes, sir? Happy to hear from you again in response.
>
> MR. POPE: It's been almost a year since he filed or -- just hearing about some motion to amend.
>
> THE COURT: Yeah, I'm not – definitely, like I said, I'm not taking that up today, and I understand your point loud and clear. Okay. Well, I'll look this over.

R. p. 167:1-10.

Lofton's written response and her motion to amend fail to raise any issues of material fact under Rule 56. The statements and arguments advanced by Lofton's counsel during the hearing are likewise inadequate to defeat summary judgment. *See Cobb v. Benjamin*, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997) (Absent a stipulation, a representation of fact by counsel in written briefs, memoranda, or made during oral argument may not be considered by the court where it is unsupported by the record.) A party's failure to properly oppose a motion made and supported as provided under Rule 56 requires entry of summary judgment. Rule 56(e), SCRCP, *supra*.

To the extent that ill health prevented Lofton from assisting her attorney in fully responding to Respondents' motion, Rule 56(f) establishes the proper procedure to be followed:

> Should it appear from the affidavits of a party opposing the motion that he cannot for the reasons stated present by affidavit facts essential to justify his

[1] Whitsitt first appeared in this action by filing the motion to restore the case to the active docket on September 28, 2017—fourteen months prior to the hearing on Respondents' motions for summary judgment on November 26, 2018. R. p. 86-87.

> opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Rule 56(f), SCRCP. Lofton failed to submit any affidavit seeking such a continuance. Lofton's unsupported eleventh-hour motion to amend is neither a proper nor sufficient substitute under the rule.

The Court misapprehends that Lofton's motion to amend was "ripe" for adjudication. From November 26, 2018, to the Circuit Court's grant of summary judgment on February 22, 2019, Lofton failed to take any steps to get her motion to amend before a judge for a hearing. Lofton failed to designate her motion to amend as a "priority matter" under Rule 40(a)(2), so the matter did not receive any preference on the motion calendar. Because Lofton's motion to amend was never set for a hearing, Respondents never received a notice of hearing as required under Rule 6(d), SCRCP, and they therefore had no opportunity, much less any obligation, to file any opposing affidavits pursuant to that rule. Lofton's motion to amend sat on the nonjury docket for weeks—a victim of its belated filing and Lofton's lack of any urgency. After filing her notice of appeal, Lofton failed to move for an order lifting of the automatic stay of the proceedings under Rule 211, SCACR, so that she could pursue her motion to amend.

On March 4, 2019, Lofton moved reconsideration of the Circuit Court's grant of summary judgment.[2] R. p. 140. Lofton first argues that "Plaintiff would show" that she did, in fact, have

[2] Lofton's notice of motion and motion purports to seek relief from the order granting summary judgment "pursuant to SCRCP 59 and 60." However, the notice further states: "Specifically, the Plaintiff will request reconsideration of the order." Lofton's motion makes no reference to clerical mistakes under Rule 60(a) or mistakes based on excusable neglect, newly discovered evidence, fraud, etc., under Rule 60(b), SCRCP and offers no affidavits or other materials in support of such claims.

standing as the real party in interest—despite having conceded that issue during the hearing. R. p. 140. She next contends:

> Plaintiff would show that a simple amendment of the named Plaintiff would remedy any defect and/or a substitution of the parties. (sic) Plaintiff would show that her motion to amend filed 26 November 2018 is properly before the court. Plaintiff would argue that her "intention to change the Plaintiff to herself as named trustee acting on behalf of the trust would not prejudice the Defendants because the Defendants were already aware of the nature of the claims being brought against them. …

R. pp. 140-141.

But Lofton then asserts:

> Plaintiff would also show that Amendment is not necessary and that she does have standing authorized by statute, because she is the successor trustee of her mother's revocable living trust and has enumerated powers under the South Carolina Probate Code, specifically she has the power to prosecute any claim on behalf of the trust in accordance with §62-7-816(24). …

R. p. 141.

The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). A party may not raise an issue for the first time in a motion to reconsider, alter, or amend a judgment that could have been presented prior to judgment. *See, e.g., Kan Enterprises, Inc. v. S.C. Dept. of Revenue*, 420 S.C. 596, 803 S.E.2d 882, 888 (Ct. App. 2017) *reh'g denied* (Sept. 22, 2017); *Anderson Memorial Hospital Inc., v.* Hogen, 313 S.C. 497, 443 S.E.2d 399, 400 (Ct. App. 1994); C.*A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268, 270 (Ct. App. 1993).

The Circuit Court's decision on the merits was that Lofton did not have standing as a real party in interest. R. pp. 22-24. Lofton conceded that her motion to amend was not properly before the Circuit Court judge and that she could not rule on the request at that time. R. p. 165:8-20.

Thus, Lofton's motion to amend was not properly encompassed within the Circuit Court's decision to grant summary judgment. *Arnold v. State*, *supra,* 309 S.C. at 172, 420 S.E.2d at 842. Lofton's attempt to raise the still unresolved motion to amend as a basis for reconsideration is improper because she could have, and indeed should have, taken steps to have the motion heard prior to the Circuit Court's grant of summary judgment. Lofton failed to do so.

Moreover, the Court of Appeals' decision disregards the requirements of Rule 17(a), SCRCP, which specifically control a party's failure to prosecute in the name of the real party in interest:

> No actions shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

In granting summary judgment and denying reconsideration, the Circuit Court was clearly aware that Lofton had known about—and failed to remedy—her lack of standing for years. Respondents initially objected to Lofton's status as a real party in interest in October of 2016. R. pp. 58-59; p. 78. Lofton continued prosecuting the case on her own behalf when the case was restored to the docket in January of 2018. R. pp. 89-90. Respondents refiled their objections by re-filing their motions for summary judgment in August and September of 2018. R. p. 97; pp. 112-113. The extended period of time afforded to Lofton to properly address her defective standing defect under Rule 17(a) was clearly reasonable. Her protracted and still unexplained failure to address the issue is incomprehensible and unreasonable.

The propriety of dismissing Lofton's claims under Rule 17, SCRCP, was explicitly addressed by Respondents at the hearing on their motions for summary judgment:

> MR. RIBACK: Elizabeth Lofton in an individual capacity has filed a lawsuit against Berkeley Coop and John Lucas Tree Company. She's testified in her deposition that she does not own the land. It's rather a trust owns the land and she is the trustee of the alleged trust. So, our first argument in asking for summary judgment is that plaintiff does not have standing to bring this claim. She has suffered no injury. In fact, whether – rather if there is any injury it's the trust that's suffered under Sea Pines v. DNR. So, we'd ask that that it be dismissed as she lacks standing. Rule 17 goes to whether you should dismiss an action. Rule 17 is pretty clear and it says that it doesn't need to be dismissed until a reasonable time has elapsed. And the original complaint was filed January of 2016, we filed a motion for summary judgment telling him the plaintiff should have standing on October of 2016 and yet nothing has been done in two years. So, our first argument is that plaintiff lacks standing to bring this claim.
>
> THE COURT: All right. …

R. p. 155:1-20.

> MR. WHITSITT: Pretty much everything he said is correct. So, the plaintiff is indeed -- the property itself is actually owned by a trust. And whoever brought this case first did not file it in the trust's name, and that was an error. …

R. p. 157: 6-9.

Lofton failed to provide any affidavit explaining her prolonged delay in moving to substitute the trust into the action as the real party in interest. She failed to provide any affidavit explaining why she could not provide such an affidavit. As set forth on p. 4 of this Petition, *supra,*

the Circuit Court pointedly asked Lofton's attorney why no such supporting affidavits had been filed. R. p. 163:21. Counsel responded:

> Well, firstly, my client had just gotten out of the hospital yesterday is my understanding. I'm happy to supplement the Court with any affidavits immediately showing that she has the authority as the trustee.

R. pp. 163:25-164:3. Despite this promise, Lofton never produced any affidavits to the Circuit Court.

The Circuit court did not have to hold a hearing on Lofton's bare-bones and unsupported motion for reconsideration. Rule 59(f), SCRCP. In granting summary judgment and denying Lofton's motion for reconsideration, the Circuit Court necessarily determined that Lofton's protracted and unexcused delay was unreasonable under Rule 17(a) SCRCP, and that dismissal of the action was therefore appropriate. That determination effectively rendered as moot Lofton's unsupported motion to amend to now add the trust as the real party in interest.

As recently stated by our Supreme Court: "Ultimately, the circuit court is not responsible for doing the plaintiff's work, and the burden of compliance with Rule 17(a) and its real party and interest requirement falls to the plaintiff." *Fisher v. Huckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018) (Plaintiff continued to maintain legally flawed position after real party status challenged by Defendants on summary judgment instead of promptly and specifically seeking to change status through ratification, joinder or substitution.) Lofton continued to personally pursue the claims in her complaint years after Respondents first moved for summary judgment. When the Court finally granted Respondents' motion, Lofton argued that she had statutory standing and that amendment was "not necessary." On appeal, Lofton expanded her arguments, claiming that she had Constitutional standing.

The Court's ruling that the Circuit Court erred in failing to consider Lofton's motion to amend overlooks and misapprehends 17(a), SCRCP.[3] It was Lofton's burden to ensure that her case was being prosecuted by a real party in interest as required by that rule. After Respondents objected to her standing by filing motions for summary judgment in in 2016, Lofton failed to take proper steps within a reasonable time to rectify the defect. Lofton has never submitted any affidavits explaining the extended delay or explaining why she could not submit such affidavits. The Circuit Court therefore acted within its discretion in granting summary judgement to Respondents on the ground that she was not the real party in interest. Remanding the case solely to enable Lofton to pursue a belated Rule 15 motion to amend unfairly penalizes the Respondents for Lofton's lack of diligence and failure to meet her burden of complying with the requirements of Rule 17(a), SCRCP. *See Fisher v. Fisher v. Huckabee, supra.*

Based on the foregoing analysis, the Court misapprehends the applicability of *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019). *Skydive* involved defendants' Rule 12(b)(6) motion to dismiss the plaintiff's complaint for failure to state a claim. The motion was made early in the action and after a hearing, the circuit court requested proposed orders from both sides. *Id.*, 179. Accordingly, Plaintiff Skydive submitted two proposed orders and "each time, Skydive requested in writing it be allowed leave to amend its complaint to cure any pleading defects…." *Id.* As stated by the majority in *Skydive*, when the trial court finds a complaint fails to state a facts sufficient to constitute a cause of action under Rule 12(b)(6), the court should give plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal. *Id.*, 179-180. Based on this, the Supreme Court ruled that the

[3] The import and applicability of Rule 17(a), SCRCP, was raised and argued by BEC in its appellate brief at pp. 12-13.

circuit court erred by dismissing the action with prejudice and failing even to consider allowing Skydive to amend its complaint. *Id.*, 180.

The subject action does not involve a Rule 12(b)(6) motion, and there is no right to amend as a matter of course prior to the grant of a motion for summary judgment. The motion to dismiss in *Skydive* was based on immunity under the South Carolina Tort Claims Act, not on the lack of standing as a real party in interest and plaintiff's failure to cure the defect within a reasonable time under Rule 17(a), SCRCP. *Id.*, 184-185. Further, as indicated above, Skydive requested leave to amend to the circuit court in the opening stages of the case, not at a hearing for summary judgment, years after defendants' objection to the standing defect. *Id.*, 179. In short, *Skydive Myrtle Beach* is both factually and legally distinguishable and the Supreme Court's rationale is not applicable to a proper resolution of this case.

Finally, to the extent they are not inconsistent with the arguments set forth herein, BEC hereby adopts and incorporates by reference the arguments in Respondent John Lucas Tree Expert, Co.'s Petition for Rehearing.

CONCLUSION

For the reasons set forth above, this Court should grant BEC's Petition for Rehearing and reverse its remand of the case for consideration of Lofton's motion to amend. For years, Lofton delayed taking any steps to rectify her deficient standing. At summary judgment, Lofton failed to submit affidavits or materials to properly oppose the motion. She failed to submit any affidavits supporting her late motion to amend or to properly continue the matter. She failed to provide any reasonable explanation for her undue delay in moving to substitute the trust as the real party in interest. As stated by our Supreme Court, the Circuit Court is not responsible for doing Plaintiff's work. Lofton bears the burden of compliance Rule 17(a) real party in interest requirements and

simply failed to do so. Therefore, the Circuit Court did not abuse its discretion in granting Respondents' motions for summary judgment and denying Lofton's motion for reconsideration. Those Circuit Court rulings rendered Lofton's tardy and unsupported motion to amend—seeking to remedy the standing defect that she had unreasonably failed to address for so long—moot. This Court should affirm the decision below and dismiss Lofton's appeal with prejudice.

Respectfully submitted,

Williams & Hulst, LLC

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Dated: March 15, 2022

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy

Trial Court Case No.: 2018-CP-10-00323
Appellate Case No.: 2019-000574

Elizabeth Lofton,.....Appellant,

v.

Berkeley Electric Cooperative, Inc. and
John Lucas Tree Expert, Co.,.....Respondents.

PROOF OF SERVICE

I certify that on the 15th day of March 2022, I served **Respondent Berkeley Electric Cooperative Inc.'s Petition for Rehearing** on the other parties to this appeal by emailing it to counsel of record as follows:

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March 15, 2022

Via S.C. Courts E-Filing & U.S. Mail
The Honorable Jenny Abbott Kitchings
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RE: Elizabeth Lofton v. Berkeley Electric Cooperative, Inc. and John Lucas Tree Expert, Co.
Civil Action Case No.: 2018-CP-10-00323
Appellate Case No.: 2019-000574

Dear Ms. Kitchings:

Enclosed for filing please find the original of Respondent Berkeley Electric Cooperative, Inc.'s Petition for Rehearing and Proof of Service in the above-referenced matter.

We will send our firm's check in the amount of $50.00 for filing the Petition for Rehearing via U.S. Mail with a copy of this letter.

Should you have any questions or need anything further, please do not hesitate to contact my office.

With kindest regards, I remain

Sincerely,

WILLIAMS AND HULST, LLC

J. Jay Hulst

JJH/bdk
Enclosures as stated.
cc: Michael A. Whitsitt, Esq. (via Email only)
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